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No. 90-323

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CARRIERS CONTAINER COUNCIL, INC.,
Petitioner,

vs.

MOBILE STEAMSHIP ASSOCIATION, INC., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court of appeals correctly apply the appropriate standard of review in affirming the district court's grant of summary judgment in the "surplus case"?

2. In affirming the district court's decision in the "surplus case" -- a lawsuit filed on behalf of employee benefit plans under §301(a) of the Labor Management Relations Act of 1947, 29 U.S.C.A. §185(a) -- did the court of appeals give due deference to two private administrative opinions procured by Carriers Container Council, Inc., the entity formed to administer the collectively-bargained Job Security Program ("JSP")?

PARTIES

The parties in this "surplus case"[1] are as follows:

Petitioner: Carriers Container Council, Inc. ("CCC").

Respondents: Mobile Steamship Association, Inc., ("MSSA"); Atlantic & Gulf Stevedores; Cooper/T. Smith Corporation; Murray Stevedoring Company, Inc.; Pate Stevedoring Company of Mobile, Inc.; Ryan-Walsh Stevedoring Company, Inc.; the Trustees of the MSSA-ILA Pension and Welfare Plans; the Trustees of the MSSA-ILA Local 1985 Maintenance Employees Pension Plan; the Trustees of the ILA-Philadelphia Maritime Trade Association Pension, Welfare and SUB Plans; International Longshoremen's Association Local Unions 1410, 1410-1, 1459 and 1985. Respondents are referred to collectively as the "Plans."[2]

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[1]This case is identified in the *Petition for Certiorari* ("*Petition*") as the "surplus case." The *Petition* joins this case with the case entitled *Carriers Container Council, Inc. v. MSSA-ILA Pension Plan and Trust* (the "withdrawal liability case"), which is a separate lawsuit decided by a separate district judge, and which involves a distinct legal claim. This *Brief in Opposition* deals exclusively with the surplus case. The Mobile Pension Plan, the only Respondent in the withdrawal liability case, has filed a separate opposition brief in that case.

[2]The following is a list of the parent companies and subsidiaries of each corporate respondent: MSSA has no parent or subsidiary companies; Atlantic & Gulf Stevedores is an operating division of ITO Corporation, which is wholly owned by International Terminal Operating Co., Inc.; Cooper/T. Smith Corporation has no parent or subsidiary companies; Pate Stevedoring Company of Mobile, Inc., has no parent or subsidiary companies; Ryan-Walsh Stevedoring Company, Inc. (correctly identified as Ryan-Walsh, Inc.) is a subsidiary of Vectura Group, Inc., and has no subsidiary companies.

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RESPONDENTS' BRIEF IN OPPOSITION

This case involves what Petitioner CCC admits was a "novel collectively-bargained response to employee benefit problems in the longshore industry" -- the Job Security Program (*Petition* at 1). The lower courts agreed that all JSP funds were to be used to alleviate these employee benefit problems and, accordingly, concluded that all employer contributions remaining in the JSP Fund after termination of the JSP must be used to benefit the employee benefit plans the JSP was created to protect.

CCC now claims that these so-called "surplus" JSP funds should be deemed "general corporate funds" and that CCC should be permitted to keep the money.

The district court granted summary judgment in favor of the Plans. The court of appeals conducted a *de novo* review of the entire record and affirmed. While the *Petition* is framed in terms of Supreme Court Rules 10.1(a) and (c), CCC's main argument is simply that the court of appeals made a "procedural error" by "permitting the district court to resolve disputed issues of material fact" on summary judgment (*Petition* at 10, 13). CCC wants this Court to review the facts and to reconsider the court of appeals' decision.

The court of appeals correctly applied well-settled law to the facts of this case and correctly affirmed summary judgment in favor of the Plans. Accordingly, the Plans respectfully request that this Court deny the *Petition*.[3]

OPINIONS BELOW

The district court's "Memorandum Opinion," including its "Determination of Uncontroverted Facts," is unofficially reported at 11 Empl. Ben. Cas. (BNA) 1449 (S.D.Ala. 1989), and is reproduced in *Petition* Appendix B (App. B at 32a-57a). The court of appeals' opinion

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[3]In the "Introduction" to the *Petition*, CCC argues that the lower courts' decisions on the JSP agreement "have had a chilling effect on coastwide longshore labor negotiations" and that "management and labor are reluctant to enter into similar labor agreements." CCC's statements are not supported by the record and are not true. In fact, after the district court ruled in this case, CCC and the ILA successfully negotiated a coastwide collective bargaining agreement that included a program similar to the JSP, the "Carrier-ILA Container Freight Station Trust Fund." The district court's decision has had a beneficial impact in that CCC and the ILA properly established the new program as a jointly-administered trust fund under §302 of LMRA, 29 U.S.C.A. §186.

(Frank Johnson, Circuit Judge) is reported at 896 F.2d 1330 (11th Cir. 1990) and is reproduced in *Petition* Appendix A (App. A at 1a-29a). On CCC's "Petition for Rehearing and Suggestion for Rehearing En Banc," the court of appeals' original opinion was modified. This *per curiam* opinion is reported at 904 F.2d 28 (11th Cir. 1990), and is reproduced in *Petition* Appendix E (App. E at 86a-87a). For convenience, references to the lower courts' opinions will be to the appendices to the *Petition*.

STATUTES

The relevant rules, statutes and regulations, which are set forth verbatim in the Appendix hereto, are as follows:

1. Federal Rule of Civil Procedure 56(c) and (e).

2. Section 301(a) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C.A. §185(a) (West 1978).

3. Section 302(c)(5) of LMRA, 29 U.S.C.A. §186(c)(5) (West Supp. 1990).

4. Sections 403(a), 403(c)(1) and 403(c)(2)(A)(i) and (ii), and 403(d)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. §§1103(a), 1103(c)(1), 1103(c)(2)(A)(i) and (ii), and 1103(d)(1) (West 1985 and West Supp. 1990).

5. Sections 4044(a) and 4044(d)(1)(C) of ERISA, 29 U.S.C.A. §§1344(a) and 1344(d)(1)(C) (West 1985 and West Supp. 1990).

6. Section 6110 of the Internal Revenue Code, 26 U.S.C.A. §6110(j)(3) (West 1989).

7. The Shipping Act of 1916, 46 U.S.C.A. §814 (West 1975 and West Supp. 1990).

8. Title 46 C.F.R. §572.104(d) (1989).

STATEMENT OF THE CASE[4]

The JSP grew out of a 1977 labor dispute involving the International Longshoremen's Association AFL-CIO ("ILA") and employer associations representing vessel carriers and stevedoring companies from East and Gulf Coast seaports. The ILA called a strike against containerized vessel carriers after coastwide negotiations broke down over the ILA's demand for a "master fund" to protect local port plans covering ILA labor in each

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[4]The "Introduction" and the "Statement of the Case" in the *Petition* misstate certain facts in the record that are material to this Court's consideration of the questions presented. *See* Supreme Court Rules 14.1(g), 15.1 and 24.2. Moreover, CCC does not fairly or accurately represent the opinions of the district court or the court of appeals. The district court's "determination of uncontroverted facts" and the opinion of the court of appeals, which are incorporated herein, correctly state the uncontroverted facts (App. B-33a-46a; App. A-3a-5a).

port from the effects of automation, particularly containerization.[5]

The local port plans were funded by employer contributions based upon the number of man-hours worked by ILA labor. Since the advent of containerization, vessel carriers had begun concentrating their vessel calls in large mechanized ports such as New York. This trend resulted in fewer vessel calls at smaller ports such as Mobile and Philadelphia, fewer man-hours worked by ILA labor in these ports, and fewer dollars contributed to their local port plans.

The ILA's strike was not resolved until the vessel carriers agreed to the first JSP agreement, which was incorporated into the coastwide collective bargaining agreement between the ILA and the employer associations (sometimes called the "master agreement").

The stated purpose of the JSP was

> to protect and preserve the job security of [ILA labor] and to protect the local port plans . . . from shortfalls [in contributions occurring after the effective date of the JSP].

To fund the JSP, the agreement obligated the carriers to pay a tonnage assessment at a specified rate for each ton of cargo loaded or unloaded by ILA labor, and

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[5]These "local port plans" were multi-employer welfare and pension plans maintained under local collective bargaining agreements between ILA local unions and employer associations at each port, and were "employee benefit plans" covered by ERISA, 29 U.S.C.A. §1001 *et seq.*, and §302(c)(5) of LMRA, 29 U.S.C.A. §186(c)(5).

provided for a non-profit corporation (CCC) to be formed by the carriers to administer the JSP.[6] Under the agreement, CCC was to collect the carriers' contributions to the JSP and

> to hold [these contributions] in interest bearing accounts or appropriate investment accounts and [to] pay out such amounts only for the obligations of the JSP Program and the expenses of administration thereof.

Although the agreement did not address the distribution of "surplus" JSP contributions upon termination of the Program, CCC's representatives often referred to CCC as a "fiduciary" holding the carriers' "contributions" to the JSP for the protection of the local port plans. Moreover, CCC's representatives referred to the JSP Fund as a "trust fund," an "escrow fund," a "feeder fund" designed to channel the carriers' "contributions" to the local port plans, and as a negotiated benefit intended as "compensation" for ILA labor. During the time the JSP was in operation, CCC never characterized the JSP Fund as "general corporate funds." (App. A-6a; App. B-43a)[7]

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[6]The entity was originally called JSP Agency, Inc. ("JSPA"). After the JSP terminated effective October 1, 1986, JSPA changed its name to CCC and amended its corporate charter to empower CCC to act as the collective bargaining representative of its carrier members. For convenience, JSPA and CCC are simply referred to as "CCC."

[7]CCC's contemporaneous descriptions of the JSP are from its own internal documents and the admissions of its representatives who testified under Fed.R.Civ.P. 30(b)(6). This evidence was part of the record in this case (*see e.g.* F2-25-3; F3-59-3; F4-5-93-94; F2-26 and 33-37; F3-77; F4-7-61-68; F4-104-107).

The JSP continued until October 1986, when the ILA, CCC (on behalf of the carriers) and the employer associations in New York and Boston entered into an agreement, which provided:

> The JSP shall be discontinued as of October 1, 1986, except for the purpose of meeting any obligations of the Fund under the existing [JSP] agreement. Any surplus, after all such obligations have been satisfied, shall be discussed with the ILA.

Neither the local port plans nor the employer associations in Mobile or Philadelphia participated in those negotiations.

In May 1988 (over one year after this case was filed), CCC, the ILA and a number of local port plans and employer associations (not including those in Mobile or Philadelphia) entered into an agreement, under which CCC settled all but one of the local port plans' outstanding "shortfall" claims, paid an additional $30.5 million in JSP funds to local port plans that did not have pending shortfall claims (primarily $27.5 million to New York), and retained the balance as "surplus" JSP funds. CCC subsequently developed a "credit memo procedure" to refund $37 million to its carrier members, leaving $24 million in JSP funds for CCC's future operating expenses.

The Plans filed this case under §301(a) of LMRA, 29 U.S.C.A. §185(a), claiming that the "surplus" resulting from the carriers' contributions to the JSP Fund must be used for the sole and exclusive benefit of the local

port plans. The Plans sought to enjoin CCC's "wrongful diversion" of JSP funds and to recover the *pro rata* portion of these funds due the Mobile and Philadelphia plans.

After completion of discovery and submission of the joint pretrial order, CCC and the Plans filed cross-motions for summary judgment.[8]

Decisions of the District Court and the Court of Appeals

The district court granted the Plans' motion for summary judgment on three independent grounds.[9]

First, applying the statutory mandates and policies underlying ERISA and §302(c)(5) of LMRA as sources of federal common law under §301 of LMRA, the district court concluded that the carriers' payments to the JSP were employer "contributions" to the local port plans and that, upon termination of the JSP, CCC was obligated to use all remaining contributions to benefit the local port plans. (App. B at 43a, 45a-46a, 53a-54a)

Second, the district court concluded that the JSP was a "negotiated benefit" for ILA labor, that the carriers' contributions to the JSP were "compensation" for work performed by ILA labor and that, after the employees

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[8]This is a non-jury case. The district court had previously granted CCC's motion to strike the Plans' jury demand on the ground that the Plans sought only equitable relief.

[9]CCC's *Petition* addresses only the third of these three grounds.

performed the work and earned the contributions to their benefit plans, CCC could not refuse to pay that accrued compensation. Accordingly, the court held that all JSP funds remaining after termination of the JSP must be used to benefit the local port plans. (App. B at 36a-38a, 43a, 46a, 52a-53a)

Third, applying "traditional rules of contract interpretation," the district court examined the language of the agreements and concluded that, although this language supported the conclusion that all JSP funds must be used to benefit the local port plans, the contract language was ambiguous because it "did not expressly deal with distribution of surplus funds after termination of the Program." Accordingly, the court considered the language of the agreements, the context giving rise to the agreements (*i.e.*, a "master fund" to protect the local port plans), the uncontroverted extrinsic evidence of the parties' manifested contemporaneous intent and the policies underlying federal labor law, and concluded that the agreements obligated CCC to use all JSP funds to benefit the local port plans. (App. B at 34a-52a)

Finally, the district court exercised its equitable power to determine the restitution due the Mobile and Philadelphia plans as their *pro rata* shares of the JSP Fund. (App. B 54a-55a)

The court of appeals conducted a *de novo* review of the record and affirmed summary judgment, with one exception. It concluded that there was a genuine issue of material fact on one element of the district court's restitution calculations, and remanded the case to the

district court on that issue. (App. A at 1a-19a, 29a; App. E at 86a-87a)

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The Court of Appeals Applied the Appropriate Standard of Review.

CCC first suggests that the Eleventh Circuit applied a "clearly erroneous" standard of review in affirming the district court's grant of summary judgment (*Petition* at 14). CCC is wrong. The court of appeals specifically set forth the "**Standard of Review**" it applied in this case:

> The district court orders granting summary judgment are subject to *de novo* review by this court. *Shipes v. Hanover Ins. Co.*, 884 F.2d 1357, 1359 (11th Cir. 1989). The court must ask whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The governing law determines what facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The court reviews the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. All factual doubts are resolved in favor of the non-movant CCC. *Hinesville Bank v. Pony Express Courier Corp.*, 868

F.2d 1532, 1534-35 (11th Cir. 1989); *Buxton v. City of Plant City*, 871 F.2d 1037, 1040-41 (11th Cir. 1989).

(Appendix A-10a)

Although the Eleventh Circuit's original opinion contained a footnote reference to the clearly erroneous standard, a review of the court's opinion shows that the court did not apply that standard in this case. Indeed, the court made clear that this standard was not applied by granting CCC's application for rehearing, in part, and striking the footnote reference (Appendix E-87a). The Eleventh Circuit's modified opinion contains one reference to the clearly erroneous standard in a *general* discussion of the law in the section considering whether the master agreement incorporated the JSP agreement. The court correctly concluded that, as a matter of law, the master agreement did incorporate the JSP agreement, a conclusion that CCC does not now dispute. (Appendix A-11a-12a)

No Eleventh Circuit decision has applied a clearly erroneous standard in reviewing a district court's grant of summary judgment. This case is no exception.

II.
The Court of Appeals Correctly Applied the Standards for Summary Judgment.

Although the *Petition* invokes Supreme Court Rules 10.1(a) and (c), in fact CCC simply contends that the court of appeals "misapplied the standards for granting summary judgment" by "permitting the district court to resolve disputed issues of fact" (*Petition* at 10, 13). Once again, CCC is wrong.

A. The Language of the Agreements and the Uncontroverted Extrinsic Evidence Fully Support Summary Judgment.

Without legal support, CCC argues that, once the courts' concluded that the JSP agreement was ambiguous, summary judgment was inappropriate *even if the extrinsic evidence of the parties' intent was undisputed* (*Petition* at 10, 12). CCC's proposed limitation on summary judgment is untenable.

CCC simply ignores the clear mandates of Federal Rules of Civil Procedure Rule 56(c) and (e), and this Court's decisions thereunder:

> Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no "genuine" issue for trial.

Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538, 552 (1986). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265, 274 (1986) ("[o]ne of the

principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported . . . defenses, and we think it should be interpreted to accomplish this purpose").

CCC also ignores the actual holdings of the lower courts. Although the courts determined that the JSP agreement was ambiguous, neither the district court nor the court of appeals concluded that the language of the agreement could *reasonably* support CCC's interpretation, *i.e.*, that JSP contributions were CCC's "general corporate funds." On the contrary, both courts concluded that the language of the agreements "support[ed] the conclusion that [JSP] funds were intended to benefit the local port plans only." The courts concluded that the agreements were ambiguous simply because the contract language "did not specifically deal with the distribution of JSP surplus after termination of the Program." (App. B-43a and 47a; App. A-15a; App. A-6a)[10]

The courts' conclusion that the JSP agreement was ambiguous does not *ipso facto* preclude summary judgment as CCC suggests. The court of appeals conducted a *de novo* review of the record and, like the district court, correctly concluded that the extrinsic evidence of the parties' intent was undisputed and that

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[10]*See e.g. Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1225 (9th Cir. 1984) (where collective bargaining agreement does not specifically address the issue, "we look to extrinsic evidence to determine if summary judgment was properly granted"); *IBEW Local 47 v. So. Cal. Edison*, 880 F.2d 104 (9th Cir. 1989) (if uncontroverted extrinsic evidence establishes that the opponent's proffered interpretation of a collective bargaining agreement is not reasonable, summary judgment is appropriate).

the Plans were entitled to summary judgment as a matter of law. *See* Fed.R.Civ.P. 56(c) and (e).

B. The Court of Appeals Correctly Concluded That There Was No "Genuine" Issue of "Material" Fact.

In an effort to convince this Court to re-examine the facts, CCC cites *two* instances in which the district court (with the concurrence of the court of appeals) purportedly resolved a disputed issue of fact (*Petition* at 11).

First, quoting the district court *out of context*, CCC claims that the district court "admitted that the extrinsic evidence was in dispute" when the court observed that CCC's deposition testimony was "somewhat contradictory" with that of the ILA's Vice President (*Petition* at 11). CCC simply ignores the district court's holding. The district court concluded that "CCC's *post hoc* self-serving testimony concerning its intended use of the JSP surplus fund [was] not relevant" and was not sufficient to raise a genuine issue of material fact (App. B-50a). *See Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d, 538, 552 (1986).

Second, CCC argues that the ILA's Vice President (who testified "that his original understanding was that the JSP 'surplus' funds had to be distributed to the local port plans and could be used for no other purpose" (App. B-50a)) "later contradict[ed] himself by stating that once the shortfalls were paid the balance [of the JSP Fund] was the carriers' money" (*Petition* at 11). This argument was properly rejected by the district court based upon the ILA Vice President's *complete* testimony. He testified that, during the time the JSP was in

operation, the ILA understood that all JSP funds were to be used to benefit the local port plans and that this understanding did not change until May 1988 (1-1/2 years after the JSP terminated), when an attorney for the ILA advised him that the ILA could enter into the 1988 settlement agreement. The district court correctly concluded that the Vice President's subsequent change of heart "[did] not bear upon the intention of the parties during the time the JSP was created and maintained" and was thus insufficient to raise a genuine issue of material fact (App. B-50a-51a).[11]

In addition to these two purported factual issues, the *Petition's* "Introduction" and "Statement of the Case" suggest, once again without record support, that both the ILA and CCC understood "that once the JSP agreement ended and all shortfalls were paid, the balance [of the JSP Fund] was the carriers' money" (*Petition* at 7, 1 and 2). As stated, the district court correctly concluded that CCC did not produce any contemporaneous evidence to support its own purported understanding of the JSP agreement (App. B B-50a). Moreover, the *record* testimony of the ILA's representatives supports the lower courts' decisions, not CCC's misstatement of the record. Thus, both the ILA's Vice President and the ILA's current President testified that the ILA's original understanding was that JSP funds

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[11]Without citing any support in the record, CCC also states that "the deposition testimony of other witnesses is similarly in conflict" (*Petition* at 11). CCC did not offer any such conflicting deposition testimony to raise a genuine issue of material fact before the district court or the court of appeals. *See* Fed.R.Civ.P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). More importantly, this unsupported statement is simply not true.

could only be used to benefit the local port plans (F4-3-41-42, 113-116, 118; F4-4-69-70).

Despite CCC's dissatisfaction with the decisions of the district court and the court of appeals, the courts correctly concluded that there was no genuine issue of material fact. *See Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538, 552 (1986).

III.
The Private Administrative Opinions Relied Upon By CCC Have No Bearing On This Case.

CCC argues that the court of appeals failed to accord due deference to a Department of Labor advisory opinion and an Internal Revenue Service private letter ruling. CCC's argument is based upon a mischaracterization of the court of appeals' decision and a misunderstanding of the law applicable in a lawsuit under §301 of LMRA.

A. The DOL Advisory Opinion.

During its administration of the JSP, CCC procured a DOL advisory opinion. Although the opinion recognized that "the JSP serve[d] as a conduit through which funds or other assets [were] channeled to employee benefit plans covered under [ERISA]," it stated that the JSP was not itself an "employee benefit plan" as defined in ERISA.

Citing the DOL advisory opinion, CCC argues that the lower courts "should be instructed not to apply ERISA to CCC" (*Petition* at 15). CCC's argument misses the point. The lower courts acknowledged that the JSP was not an "employee benefit plan" covered by ERISA, but correctly concluded as follows:

> CCC argues that the policies of ERISA do not apply because the JSP Program was neither an employee benefit plan within ERISA nor a fringe benefit plan within [§302(c)(5) of LMRA], 29 U.S.C.A. §186(c)(5). In support of its argument, CCC cites a letter opinion from the Secretary of Labor that CCC (then JSPA) is not an employee benefit plan within ERISA. CCC's argument fails to address the reasoning of the district court. As the district court conceded, the JSP Program does not fall under ERISA or §186(c)(5). That finding, however, does not resolve the question of the proper characterization of surplus funds held by CCC. The district court did not hold that ERISA itself applied; the federal common law of labor applied, *Lincoln Mills*, 353 U.S. at 456-57, 77 S.Ct. at 917-18, and the content of the federal common law is determined by reference to federal labor policies such as those reflected by ERISA and §186(c)(5). *Id.* Moreover, as the district court observed, the JSP Program was created to benefit the local port plans. Because the assessments that make up the surplus were collected for the purpose of benefiting ERISA-governed funds, the policies behind ERISA are relevant to the question of what should happen to the surplus. Accordingly, CCC's argument that

the district court erred in referring to ERISA and Section §186(c)(5) is meritless.

(App. A-17a; App. B-46a and B-53a-54a)

The court of appeals correctly concluded that the policies underlying ERISA and §302(c)(5) of LMRA provide compelling sources of the "evolving federal common law" to be applied in determining the rights and obligations of the parties under the JSP. CCC admits that the JSP agreement was an "assessment agreement" under the Shipping Act of 1916, 46 U.S.C.A. §814, and that the agreement was thus, by definition, an agreement to "provide funding for collectively-bargained fringe benefit obligations." *See* 46 C.F.R. §572.104(d). Moreover, CCC's representatives often referred to CCC as a "fiduciary" holding the carriers' "contributions" to the JSP for the protection of the local port plans, and to the JSP Fund as an "escrow" fund, a "depository" and a "feeder fund" designed to channel the carriers' "contributions" to the local port plans. Indeed CCC's legal counsel in this case advised the Philadelphia Pension Plan that CCC did not object to the designation of the JSP funds as "contributions" for the purpose of meeting the minimum funding requirements under ERISA. (F2-25-3; F3-59-3; F2-31-8; F2-37; F4-5-93-94)[12]

The court of appeals correctly held that the carriers' payments to the JSP Fund were employer contributions to the local port plans and that "under the federal

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[12] *See e.g., Bugher v. Feightner*, 722 F.2d 1356, 1358-59 (7th Cir. 1983) (ERISA supplements and expands the sources of federal common law applicable to collective bargaining agreements and to the multi-employer benefit plans created and maintained under such agreements), *cert. denied* 469 U.S. 822 (1983).

common law, as reflected in ERISA, CCC cannot refund any [JSP] assessments to the carriers" (App. A-17a). For this reason alone, summary judgment in favor of the Plans was appropriate.[13]

B. The IRS Private Letter Ruling.

In conjunction with the proposed refund of JSP contributions to its carrier members in late 1988, CCC procured an IRS private letter ruling stating simply that the proposed transaction would not adversely affect CCC's status as a tax exempt organization (F1-27, 322-323). Although this case was pending when CCC sought and procured the IRS private letter ruling, CCC did not advise the IRS of the case or of the Plans' allegations in the case. In fact, in requesting the private letter ruling, CCC characterized the proposed transaction as a "distribution of excess dues" to its members. CCC had *never* before referred to the JSP contributions as membership "dues." (F1-27-325-334)

The IRS did not consider (and could not consider) either CCC's obligations under the collective bargaining agreements or the impact of federal common law in a lawsuit under §301 of LMRA. In sum, the IRS did not consider any issue addressed in this case. Moreover, an IRS private letter ruling "may not be used or cited as precedent" for any purpose. *See* 26 U.S.C.A. §6110(j)(3);

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[13]Absent an express provision in the JSP agreement, CCC may not refund JSP contributions to contributing carriers. *See* ERISA, 29 U.S.C.A. §1103(c)(1), §1103(d)(1) and §1344(d)(1)(C); *Audio Fidelity Corp. v. PBGC Audio Fidelity*, 624 F.2d 513 (4th Cir. 1980) (retroactive plan amendment to recapture surplus contributions is prohibited by ERISA); §302(c)(5) of LMRA, 29 U.S.C.A. §186(c)(5).

David R. Webb Co., Inc. v. C.I.R., 708 F.2d 1254, 1257n.1 (7th Cir. 1983). Quite simply, the private letter ruling was not relevant to this case.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be *denied*.

Dated September 19, 1990.

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APPENDIX

RULES, STATUTES & REGULATIONS

1. Federal Rules of Civil Procedure 56(c) and (e).

Rule 56. Summary Judgment.

* * *

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be

supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

* * *

2. Labor Management Relations Act of 1947 ("LMRA") §301(a), 29 U.S.C.A. §185(a) (West 1978).

§185 Suits by and against labor organizations Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

3. LMRA, §302(c)(5), 29 U.S.C.A. §186(c)(5) (West Supp. 1990).

§ 186 Restrictions on financial transactions

* * *

(c) Exceptions

The provisions of this section shall not be applicable . . . ; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there

are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of ether group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust fund which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities;

* * *

4. Employee Retirement Income Security Act of 1974 ("ERISA"), §403(a), §403(c)(1), §403(c)(2)(A)(i) and (ii), and §403(d)(1), 29 U.S.C.A. §§1103(a), 1103(c)(1), 1103(c)(2)(A)(i) and (ii) and 1103(d)(1) (West 1985 and West Supp. 1990).

§1103 Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section,

all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that --

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

(2) authority to mange, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

* * *

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants

in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter --

(i) made by an employer to a plan (other than a multi-employer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and

(ii) made by an employer to a multi-employer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of Title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of Title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

* * *

(d) Termination of plan

(1) Upon termination of a pension plan to which section 1321 of this title does not apply at the time of termination and to which this part applies (other than a plan to which no employer contributions have been made) the assets of the plan shall be allocated in accordance with the provisions of section 1344 of this

title, except as otherwise provided in regulations of the Secretary.

* * *

5. ERISA, § 4044(d)(1)(C), 29 U.S.C.A. §1344(d) (d)(1)(C) (West 1985, and West Supp. 1990).

§1344 Allocation of assets

* * *

(d) Distribution of residual assets; remaining assets

(1) Any residual assets of a single-employer plan may be distributed to the employer if --

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

* * *

6. Internal Revenue Code, §6110, 26 U.S.C.A. §6110(j)(3) (West 1989).

§ 6110 Public inspection of written determinations

* * *

(j) Special provisions. --

* * *

(3) Precedential status. -- Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent. The preceding sentence shall not apply to change the precedential status (if any) of written determinations with regard to taxes imposed by subtitle D of this title.

7. Shipping Act of 1916, 46 U.S.C.A. §814 (West 1975, West Supp. 1990).

§814 Contracts between carriers filed with Commission definition of "Agreement"; approval, disapproval, etc., by Commission; unlawful execution of agreements; conference agreements; assessment agreements; antitrust laws exemptions; civil action for penalties; terminal leases exemption

Every common carrier by water in interstate commerce, or other person subject to this chapter, shall

file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements, but does not include maritime labor agreements or any provisions of such agreements, unless such provisions provide for an assessment agreement described in the fifth paragraph of this section.

* * *

Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, shall be deemed approved upon filing with the Commission. The Commission shall thereafter, upon complaint filed within 2 years of the date of filing the agreement, disapprove, cancel, or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice

and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United Sates. The Commission shall issue its final decision in any such complaint proceeding within 1 year of the date of filing of the complaint. To the extent that any assessment or charge is found, in such a complaint proceeding, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall remedy the unjust discrimination or unfairness for the period of time between the filing the complaint and the final decision by means of assessment adjustments. Such adjustments shall be implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant who has ceased activities subject to the assessment or charge, in which case reparation may be awarded. To the extent that any provision of this paragraph conflicts with the language of section 821 of this title or any other section or this chapter, or of the Intercostal Shipping Act, 1933 [46 U.S.C.A. §843 et seq.], the provisions of this paragraph shall control in any matter involving assessment agreements described herein.

* * *

9. Federal Maritime Commission, 46 C.F.R. §572.104(d) (1989).

§572.104 Definitions

* * *

(d) *Assessment agreement* means an agreement, whether part of a collective bargaining agreement or negotiated separately, to the extent that it provides for the collectively bargained fringe benefit obligations on other than a uniform man-hour basis regardless of the cargo handled or type of vessel or equipment utilized.

* * *